MARTHY KUTHAN

v.

RAMA KARUPIAH & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 2275 OF 1985]
2 AUGUST 1989

DAMAGES: *Claim for indemnity and/or contribution - Trial of preliminary issue - Whether s. 31 of the Employees Social Security Act 1969 prevents third parties from claiming contribution and indemnity from an employer in respect of an employment injury suffered by employee.*

The plaintiff who was the attendant of a lorry which was owned by the 3rd defendant sued for damages when the lorry was involved in a collision with another lorry driven by the 1st defendant and owned by the 2nd defendant.

The 1st and 2nd defendant in their pleadings stated that in the event of their being found liable to the lorry attendant, they would claim indemnity and/or contribution from the employer of the plaintiff i.e. the 3rd defendant.

The 3rd defendant in his defence averred *inter alia* that the plaintiff was not entitled to claim against the 3rd defendant by virtue of s. 31 of the Employees Social Security Act 1969 which prevents an employee from recovering compensation or damages from the employer in respect of employment injury sustained as an employee and that therefor neither the 1st nor the 2nd defendant was entitle to claim any indemnity or contribution from the 3rd defendant.

One of the preliminary issues to be determined was whether the 3rd defendant is liable to the 1st and 2nd defendants for contribution in respect of the plaintiff's claim.

Held:

The golden rule of interpreting s. 31 of the Employees Social Security Act 1969 is the literal rule, the plain and ordinary meaning of the words ought to be given to the words. The ordinary sense of the words does not say at all that, in respect of "an employment injury", if an employee sues, not the employer but some third party, the third party cannot claim contribution against his employer on ground of vicarious liability. Such a meaning if it were to be given would not give rise to any absurdity nor does it give rise to any inconsistency with the rest of the Act.

Cases referred to:

Sambu Pernas Construction & Anor. v. Pitchakkaran [1982] CLJ (Rep) 299
Tan Peng Loh v. Lee Aik Fong & Anor. [1981] CLJ (Rep) 96
Grey v. Person [1857] 6 HLC 61, 106
Vacher v. London Society of Compositors [1913] AC 107

Legislation referred to:

Civil Law Act 1956, s. 10(1)(c)
Employees' Social Security Act 1969, s. 31
Trade Disputes Act 1906 [UK], s. 4

For the plaintiff - C.K. Leong; M/s. C.K. Leong & Co.
For the 1st and 2nd defendants - Azman bin Mansor; M/s. Skrine & Co.

JUDGMENT

Peh Swee Chin J:

The plaintiff, (hereinafter called the lorry attendant), was at all material times the attendant of motor lorry (AAN 1624) owned by the 3rd defendant (hereafter called the employer), the said lorry (BT 7869) driven by the 1st defendant (hereafter called the other lorry driver) and owned by the 2nd defendant, (hereafter called the other lorry owner).

The plaintiff sued for damages in respect of the said collision, not only citing the other lorry driver and the other lorry owner as defendants, but also the employer, who was not only the employer of the said attendant but also of the driver of the lorry of which the said lorry attendant was the lorry attendant.

Pleadings were filed and exchanged, and by their joint defence, *inter alia*, the other lorry driver and the other lorry owner put the other parties on notice that in the event of their found liable to the lorry attendant, they would claim indemnity and/or contribution from the said employer, etc.

By the defence filed by the said employer, the said employer averred, *inter alia*, that the said lorry attendant was not entitled to claim against the said employer by virtue of s. 31 of the Employees' Social Security Act 1969 and that neither the other lorry driver nor the other lorry owner was entitled to claim any such indemnity or contribution from the said employer.

The issues aforesaid thus brought out by the pleadings were crying out to be determined and the said employer's solicitors duty took out a summons for 3 specified questions to be tried as preliminary issues, the 3 questions being as follows with the words in brackets being mine for the sake of clarity.

(a) Whether plaintiff's rights (the said lorry attendant's right) to claim damages in this action arose out of personal injuries caused by accident arising out of and in the course of his employment with the third defendant (the employer)?

(b) If so, whether the plaintiff's (the attendant's) claim in this action is barred by s. 31 of the Employees' Social Security Act 1969?

(c) If so, whether the third defendant (the employer) is liable to first and second defendants (to the other lorry driver and the other lorry owner) for contribution in respect of the plaintiff's (the attendant's) claim under s. 10(1)(c) of the Civil Law Act 1956?

All parties agreed to the effect that for the trial of preliminary issues, there be no evidence *viva voce* in view apparently of relevant admissions of the parties herein as to who was the driver of which particular lorry, etc.

At the trial of the preliminary issues, solicitors for the said employer and the other lorry owner and driver agreed (but solicitors for lorry attendant did not find it necessary to take part in the argument before me and were absent and for whom the solicitors for the said employer have "mentioned"), at the outset that by consent, the answers to both first and second questions or issues be affirmative, leaving only question no. 3 to be tried, i.e. whether the said employer was liable to the other lorry owner and driver for contribution under s. (10)(1)(c) of the Civil Law Act 1956 in the following words:

10.(1) Where damages is suffered by any person as a result of a tort (whether a crime or not):

(a) ...

(b) ...

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

I will set out s. 31 of the Employees' Social Security Act 1969 which was relied on to deny the right to claim the contribution stated above.

> 31. An injured person or his dependants shall not be entitled to receive or recover from the employer of the insured person:
>
> (i) any compensation under the Workmen's Compensation Ordinance 1952, or
>
> (ii) damages under any other law for the time being in force,
>
> in respect of an employment injury sustained as an employee under this Act.

Learned Counsel for the said employer submitted that since s. 31 of the Employees' Social Security Act 1969 barred the lorry attendant from claiming from his employer (i.e. the said employer), the claim for contribution against the said employer by the other lorry owner and driver should also be barred. When asked for any decided case for such submission, learned Counsel very frankly stated that he had none to cite to the Court directly on the point. He cited however, *Sambu Pernas Construction & Anor. v. Pitchakkaran*, [1982] CLJ (Rep) 299 as being analogically supportive of his submission. He asked both the claim against the employer and the claim against the employer by the other lorry owner and driver for contribution be dismissed with costs.

Learned Counsel for the other lorry owner and driver on the other hand, submitted that the Employees' Social Security Act 1969 would not a bar a claim for contribution against the employer, analogically also because it was held by the Federal Court in *Tan Peng Loh v. Lee Aik Fong & Anor.* [1981] CLJ (Rep) 96 that in a claim by one employee against another a fellow-employee, in a case when Employees' Social Security Act 1969 applied, the right to claim damages from the fellow-employee at common law remained unaffected by the said Act.

The Court, after giving brief reasons, dismissed the claim by the plaintiff (the lorry attendant) against the 3rd defendant (the said employer), i.e. with the claim by the sole plaintiff against 3rd defendant being dismissed. The Court declared that the answer to the question (c) (in encl. 17) was affirmative, subject to proof of liability against the driver of the lorry owned by the 3rd defendant and in which the plaintiff was a passenger, i.e. the lorry attendant. In other words, should a claim for such contribution be made, on the proof of liability against the driver (co-employee) of the lorry owned by the 3rd defendant, such claim could be lawfully made.

The claim for contribution in the circumstances of this case cannot in my view be barred by s. 31 of the Employees' Social Security Act. If a claim by an employer against a fellow-employer cannot be barred by the same section, as held by the Federal Court in Tan Peng Loh, I see no reason while a claim for contribution against the common employer can be barred. The reasons by given the Federal Court for its decision in Tan Peng Loh, can apply equally to this situation of a claim for contribution against the common employer. In conjunction with the express words of the said s. 31, the Federal Court said:

> It is presumed that the legislature does not intend to make any charge in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliaments would depart from the general system of law without expressing its intention with irresistible

> clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are "fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law. (See *Maxwell on Interpretation of Statutes* 12th Edn. p. 116, and the cases referred to in the foot-note).

It therefore follows that in the absence of express exclusion of fellow employees the right to recover damages from 1st respondent, a fellow employee remains.

Perhaps I need to give more grounds that have existed for fortifying my conclusion as the facts of the instant case were not on all fours with the facts in Tan Peng Loh, the question here being contribution against the same employer in the instant case.

The golden rule for construing statutes and all written instruments was stated by Lord Wensleydale in *Grey v. Person*, [1857] 6 HLC 61, 106 as follows:

> In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of instrument, in which case, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency...

The golden rule means in effect the literal rule that plain ordinary meaning of the words ought to be given to the words.

First, the grammatical and ordinary sense of the words does not say at all that, in respect of "an employment injury" within the purview of the Act, if an employee sues, not the employer, but some third party, the third party cannot claim contribution against his employer on ground of vicarious liability.

Again, would such grammatical and ordinary sense of the words of said s. 31 of the Act, give rise to an absurdity? There is no such absurdity as the Act is, to quote the explanatory note of Act, "an Act to provide certain benefits to employees in case of invalidity and employment injury including occupational diseases and to make provision for certain other matters in connection thereto". It, by no means, codifies all the law of master and servant, or the common law as to any right to claim contribution. The intention of the legislature is to be known, by the words used in a statute.

I have gone through the rest of the Act, it would appear that adopting the ordinary sense of the words of the said s. 31 does not also give rise to any inconsistency with the rest of the Act.

The argument of learned Counsel for the said employer as to the effect of the words of s. 31 (barring the claim for contribution) would appear to be in the same vein as some argument in the case of *Vacher v. London Society of Compositors*, [1913] AC 107.

In *Vacher* case, Vacher sued the defendant, a trade union for libel. The master, on an O. 14 application, struck out the action against the defendant as being incompetent by virtue of s. 4 of Trade Dispute Act 1906 in respect of immunity of trade union from actions for torts. Section 4 provided that "an action against a trade union ... in respect of any tortious act ... shall not be entertained by any Court." It was sought to be argued that the s. 4 would only apply to a tortious act in contemplation or furtherance of a trade dispute and that there was no contemplation of furtherance of any trade dispute there. This argument was unanimously rejected by the House of Lords and the Master's order was restored. It was *inter alia*, held

that notwithstanding the title of the Act, i.e. "Trade Disputes Act," the generality of the words "any tortious act" could not be limited in the way contended for, the words being unambiguous and plain.

I therefore made the order as set out above.

Also found at [1989] 2 CLJ 1023